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September 26, 2006

**EX PARTE AND UNDER SEAL**

Hon. Leonie M. Brinkema  
United States District Judge  
U.S. District Court for the Eastern  
District of Virginia  
401 Courthouse Square  
Alexandria, VA 22314

Re: United States v. Ali al-Timimi, Case No. 04-385-A

Dear Judge Brinkema:

As you know, during our investigation of the Moussaoui case, I was granted access to the files of the September 11 Commission that were maintained in the National Archives. Many of the files that we reviewed were classified. Many were not. It would be impossible for me to state to you whether the files that I reviewed that are the subject of this letter are classified or unclassified. I know that I reviewed them in a SCIF and that is enough to make me careful.

The purpose of this letter is to disclose to you that in the course of reviewing these documents, I came across a file that appeared to show that al-Timimi had been the subject of an FBI investigation before September 11, 2001. There was a file that clearly identified al-Timimi and stated some brief information regarding the investigation. I do not recall if it was one or two pages but it was plainly a summary of the results of an investigation that would have led to more documents. I did not ask for a copy of this file because I did not believe that the access I had been granted to these files allowed me to seek copies of files that I could use in a different representation. My best guess of where these files were maintained was in the portion of the records that addressed the August 6, 2001, Presidential Daily Briefing which states that there are many ongoing FBI investigations of suspected Al Qaeda members in the United States in that time frame.

I believe that this information is important and would have been helpful to me in trying al-Timimi's case. As the Court may recall, the Government stipulated, after CIPA hearings, to the nature and extent, including the precise duration, of the surveillance of al-Timimi by the United States. I argued to the jury that the lack of other incriminating evidence derived from

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such extensive surveillance meant the al-Timimi's statements to the FBI in which he claimed innocence were more credible than the words of the government's own witnesses who are now free. Had I known that there was additional surveillance that did not produce any incriminating evidence against a man with no prior criminal record, I could have used that fact as well in the case. In addition, if there was additional surveillance, by FISA wiretap or without a warrant, the stipulation entered in the case was either grossly misleading or false which is also of great concern to me. The fact that al-Timimi was subject to a prior FBI investigation before 9-11 makes it much more likely that other calls of relevance to this case, such as calls from al-Timimi and others to Saudi Arabia and Pakistan could have been intercepted before any FISA warrants were issued.

I am happy to report these matters to you in whatever fashion, publicly or privately, as the Court deems appropriate. While this matter was before you on remand, I simply did not believe that it was ethically appropriate for me to not bring these matters to your attention.

Best Regards,



Edward B. MacMahon, Jr.

EBM/nlj

cc: Christine Gunning